Nos. 90-757 and 90-1852

In The

Supreme Court of the United States

October Term, 1990

RONALD CHISOM, ET AL.,

Petitioners,

versus

CHARLES E. ROEMER, ET AL.,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

versus

CHARLES E. ROEMER, ET AL.,

Respondents.

On Writ Of Certiorari To the United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

Did Congress intend the word "representatives" as used in the Voting Rights Act of 1965, § 2(b) as amended, 42 U.S.C. § 1973, to include judges who are selected by a state judicial electoral process?

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STATEMENT OF THE CASE[1]

Petitioners [hereinafter collectively "CHISOM"] brought this suit in the United States District Court for the Eastern District of Louisiana on behalf of all black registered voters in Orleans Parish, approximately 135,000 people. [Joint Appendix Pages 5, 8 (hereinafter "J.A. #")]. The suit challenged the at-large election of two Justices to the Louisiana Supreme Court from the parishes of Orleans, St. Bernard, Plaquemines and Jefferson (the First Supreme Court District) as being in violation of the 1965 Voting Rights Act, as amended, because of alleged dilution of the voting strength of CHISOM. [J.A. 5-6]. Jurisdiction was based on 28 U.S.C. §§ 1331 and 1343 as well as 42 U.S.C. § 1973. The action sought declaratory

---

[1] The private petitioners, Ronald Chisom, et al., have presented the following Question:

> Does section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973, cover elections for judicial office?

Respondents present the following question:

> Did Congress intend the word "representatives" as used in the Voting Rights Act of 1965, § 2(b) as amended, 42 U.S.C. § 1973, to include judges who are selected by a state judicial electoral process?

Respondents do not take the position that Section 2 of the Voting Rights Act as initially enacted in 1965 was not applicable to the state judicial electoral process. The original Section 2 is coterminous with the Fifteenth Amendment to the United States Constitution, which binds everyone. *City of Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980). It is the "results" test set forth in Section 2(b) which the respondents have always contended was not intended to embrace state judicial electoral processes.

Perhaps the question was better and more succinctly put by the Solicitor General:

> Whether the results test of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, applies to the election of state court judges.

and injunctive relief, 42 U.S.C. §§ 1973 and 1983. CHISOM prayed for relief under 28 U.S.C. §§ 2201 and 2202 and the Fourteenth and Fifteenth Amendments to the United States Constitution. [J.A. 6]. CHISOM sought the division of the First Supreme Court District into two districts, one to be comprised of the parishes of Jefferson, Plaquemines and St. Bernard and the other of Orleans Parish where blacks constituted a majority (51.6%) of the registered voters. [J.A. 8].

After the complaint was filed, respondents, Edwards, et al. [hereinafter collectively "ROEMER"], filed a Fed.R.Civ.P.12(b)(6) motion to dismiss for the failure of CHISOM to state a claim upon which relief could be granted. The district court agreed with ROEMER's contention that Congress did not intend to apply the word "representatives" in Section 2 of the Voting Rights Act, as amended, to embrace members of the judiciary. *Chisom v. Edwards*, 659 F. Supp. 183 (E.D. La. 1987). [J.A. 12]. The district court drew a distinction between the impartial functions performed by the judiciary without a constituency and the functions performed by representatives who are not expected to be impartial but rather reflective of the needs and wishes of their constituency. 659 F. Supp. at 186. [J.A. 21].

The district court further held that CHISOM lacked the requisite allegations necessary to prove a violation of the Fourteenth and Fifteenth Amendments of the Federal Constitution because CHISOM claimed alleged discriminatory effect instead of discriminatory intent. [J.A. 25]. The district court granted CHISOM ten days to amend the complaint to cure this defect; no such amendment was forthcoming.

CHISOM appealed to the United States Court of Appeals for the Fifth Circuit, which reversed the district court and remanded the case because the appellate court concluded that Section 2 does apply to the election of state court judges. The appellate court also resurrected the federal constitutional claims. *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988). [J.A. 26].

ROEMER filed both an application for rehearing and a suggestion for rehearing *en banc*. Pending a decision thereon, CHISOM moved for an injunction to arrest a pending election in the First Supreme Court District. ROEMER contended that the motion was improper because the district court continued to have jurisdiction concerning an injunction. Both rehearing applications were denied by the appellate court on May 27th, 1988. At the same time, CHISOM's motion for an injunction was denied because CHISOM failed to comply with F.R.App.P.8(a).

ROEMER then filed a Petition for a Writ of Certiorari in this Court. *Roemer v. Chisom*, 57 U.S.L.W. 3162 (U.S. Aug. 23, 1988) (No. 88-327).

Pending this Court's consideration of the petition, CHISOM sought an injunction in the district court to prevent the scheduled election. During the argument therefor, the district court granted unopposed class certification and granted the injunction. *Chisom v. Edwards*, 690 F. Supp. 1524 (E.D. La. 1988). ROEMER's motion for a stay was denied by the district court, and ROEMER appealed the injunction order to the Fifth Circuit. There a motion to stay was granted. *Chisom v. Roemer*, 850 F.2d 1051 (5th Cir. 1988). At this point the case was simultaneously in the district court, the Fifth Circuit, and this Court.

While the injunction issue was pending in the Fifth Circuit and the Petition for a Writ of Certiorari was pending in this Court, the UNITED STATES applied to the district court for permission to file a Complaint in Intervention pursuant to Title IX of the Civil Rights Act of 1964, 42 U.S.C. § 2000b-2. [**J.A. 45-49**]. The application was granted on August 8, 1988. Thereafter, CHISOM filed a Motion for Summary Judgment, which was opposed by ROEMER and subsequently denied by the district court.

The injunction was reversed by the Fifth Circuit. *Chisom v. Roemer*, 853 F.2d 1186 (5th Cir. 1988). A Motion for Rehearing and a Suggestion for Rehearing *En Banc* filed by CHISOM were denied on September 14, 1988.

This Court denied ROEMER's Petition for a Writ of Certiorari on November 14, 1988. 488 U.S. 955 (1988).

The district court then proceeded to a bench trial on the merits. The court considered the evidence as reflected through the testimony of several witnesses, six of whom were qualified as experts, 109 Stipulations of Fact as agreed to by the parties, six exhibits introduced by CHISOM, including expert reports, forty-seven exhibits introduced by the UNITED STATES, including an expert report, and four exhibits introduced by ROEMER, including expert reports.

In crafting its opinion, the district court took into consideration all three of the threshold tests in *Thornburg v. Gingles*, 478 U.S. 30 (1986), as well as the "totality of circumstances" criteria from *Thornburg*.[2] The district court first addressed the minority group's obligation to prove ***that it is sufficiently large and geographically compact to constitute a majority in a single-member district.*** 478 U.S. at 50. With population size as the stipulated indicia of an ideal district, the district court found that the deviations would be as follows using various combinations of parishes:

Orleans Parish .....-7.2%

Jefferson, Plaquemines and St. Bernard Parishes .....-9.3%

* * *

Orleans and St. Bernard Parish .....-3.4%

Plaquemines and Jefferson Parishes.....-20.0%

* * *

Plaquemines, St. Bernard and Orleans Parishes [with, however, a black voter registration of only 45.3%] 1.1%

Jefferson Parish .....-24.3%

---

[2] In explaining its reasons for this exhaustive evidentiary approach the district court stated "*Monroe v. City of Woodville*, No. 88-4433, slip op. (5th Cir. Aug. 30, 1989), suggests that the

(Continued on following page)

[Appendix to Petition for a Writ of Certiorari, *Chisom v. Roemer* [hereinafter "App."] 13a-14a].

The district court concluded:

> Thus, if two districts were drawn without crossing parish boundaries (as is the case in the rest of the state) and if the "ideal district" were based upon population alone, no single member district may fairly be drawn in which blacks would constitute a majority of the voting age population and registered voters. Either Jefferson Parish or Orleans Parish would have to be isolated in such a districting scheme, leaving a second district with an atypically low voter population. Moreover, to date, no parish is isolated as a single district in this state. The Court does not find any of the suggested divisions of the First District to be a particularly "ideal" result. It appears the only way to provide a sizable single member district in which blacks would constitute a voting age majority would be to create a gerrymandering district lacking geographical compactness.

[App. 15a-16a] (footnotes omitted).

The district court then turned to and considered the two other *Thornburg* threshold tests together – that a minority group must prove ***that it is politically cohesive*** and ***that the white majority votes sufficiently in a bloc to enable it to usually defeat the minority's preferred candidate because the minority's submergence in a white multi-member district impedes the minority's ability to elect its chosen representative.*** 478 U.S. at 51. The district court initially stated:

(Continued from previous page)

Court need not reach the *Thornburg* totality of the circumstances inquiry, if it finds that the plaintiffs fail to establish all three elements of the initial 3-part test in *Thornburg*. This Court nonetheless makes the following findings, in part to provide a full record of findings and in part because the inquiry into these elements overlaps to some extent the inquiry into political cohesion and bloc voting." [App. 21a, n.30].

> The Court finds that the judicial elections are sufficiently different from elections for legislative and administrative offices to warrant caution in making inferences about voter behavior using the techniques employed to analyze voter polarization and vote dilution in those other types of elections. In particular, judicial elections as contrasted to those other elections are characterized by lower turnout, higher roll-off rates and less voter interest. For example, analyses of the level of competition for judicial offices compared to state legislative offices within the four parish area of the First Supreme Court District during the past decade indicate that almost 64 percent of judicial races have been uncontested, whereas only 30 percent of state senate and house of representative elections have gone uncontested. The number of candidates for judicial offices is particularly low in the election years when the terms of incumbent judicial officers expired.

[**App. 17a-18a**] (footnotes omitted).

The district court then looked at voter registration, concluding:

> In sum, notwithstanding historic disenfranchisement, voter registration since 1965 has demonstrated generally increased participation by black voters, and today no state action or laws prevent black participation in the electoral process. In the summer of 1984, the most recent analysis of voter registration by race showed over seventy percent of both races are registered to vote and that the gap in between black and white voter registration continues to close. In fact, as previously indicated, black voter registration now exceeds white voter registration in Orleans Parish.

[**App. 25a**].

The district court then looked at the history of the First Supreme Court District. The First Supreme Court District, consisting of the city of New Orleans and its

surrounding environs, has been the only district that has elected two Justices since adoption of the 1879 Louisiana Constitution more than 110 years ago [**App. 25a**]; *see* La. 1879 Const. art. 82. In each of the Constitutions since then, this districting plan has been "readopted without objection." [**App. 26a**].[3]

The most recent Louisiana Constitution took effect in 1974 after the 1973 Louisiana Constitutional Convention. Twelve of the 132 delegates to the Convention were black. [**App. 27a**]. During the Convention three amendments were proposed to divide the Supreme Court into single-member districts. The first was defeated 85-27, with one black delegate voting for the proposal, eleven against, and one absent. [**App. 28a**]. The second was defeated 67-47, with seven blacks voting for the amendment, four against, and one absent. [**App. 28a**]. The final amendment proposed splitting the First Supreme Court District into two districts, with one Justice to be elected from each. When a white delegate argued in favor of the proposal, a black delegate from Orleans Parish responded that the present arrangement should not be changed. [**App. 28a-29a**]. This amendment was defeated 63-50, with five blacks voting for the amendment and seven against. [**App. 29a**]. The final districting plan, leaving the First Supreme Court District with two Justices, was adopted 103-9, with eight blacks voting for the plan, one against, and two absent. [**App. 29a**]. Four of the blacks voting for the plan were delegates from Orleans Parish. The lone black who voted against the plan was from East Baton Rouge Parish.

The proposed Constitution was ratified by the voters of Louisiana on April 20th, 1974, [**App. 29a**], and was precleared by the United States Department of Justice on

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[3] *See* La. 1898 Const. art. 87; La. 1913 Const. art. 87; La. 1921 Const. art. 7, § 9; and La. 1974 Const. art. 5, § 4.

November 26, 1974.[4] A proposed constitutional amendment to split the district with Orleans Parish constituting a district by itself was defeated by the Louisiana voters in October, 1989, with the unofficial Associated Press totals showing a vote of 151,342 for the amendment and 451,845 against the amendment. *Baton Rouge State-Times,* October 9th, 1989. In Orleans Parish the amendment was defeated by a three-to-one majority, with 16,526 voting for the amendment and 46,354 voting against the amendment. *New Orleans Times-Picayune,* October 8th, 1989.[5]

The district court next discussed ***3. Other Discrimination*** and addressed both the legal profession's accessibility by blacks and, as to higher education, took judicial notice of the court's own Order and Reasons in *United States v. State of Louisiana,* 692 F. Supp. 642 (E.D. La. 1988), concerning a higher dual education system in Louisiana.[6] **[App. 30a-32a]**.

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[4] Defendant's [ROEMER's] Exhibit No. 4, admitted April 5, 1989, Trial Transcript p. 6; *see also Chisom v. Edwards,* 690 F. Supp. 1524, 1525 & n.4 (E.D. La. 1988).

[5] Given that Orleans Parish at that time had majority black registered voters (53.6%), **[App. 11a]**, and given that the amendment was defeated three to one in Orleans Parish, it is fair to surmise that blacks in Orleans Parish opposed this constitutional amendment which would bring about the very same remedy sought by CHISOM in this case.

[6] This Order of August 1, 1988, was subsequently vacated by this same district court, by an Order issued on October 30, 1990, which reads, in pertinent part:

> [T]he Court VACATES its Order of August 1, 1988, DENIES summary judgment in favor of the United States, GRANTS summary judgment in favor of all defendants, and DIRECTS the clerk to enter herewith final judgment in accordance with this order.

United States of America v. State of Louisiana, et al., No. 80-3300 (E.D. La. October 30, 1990) (footnotes omitted).

The district court next turned to ***4. Recent Access to Political Candidacy.*** After discussing several political contests within the First Supreme Court District, the district court noted, "[T]he significance of black candidacy must be remarked, however recent its development" **[App. 36a]**; and, that "[n]otwithstanding Louisiana's history of discrimination, the recent careers of several of New Orleans' black politicians demonstrate the increased access minority members have had to local political processes, including the judiciary. While such success is usually due to large support by the black community, the white vote has contributed significantly to the election of black candidates." **[App. 37a-38a]**. The district court concluded this section of its Opinion with:

> The above facts show many areas of judicial office in which black candidates have not participated. However, this Court is not prepared to make a blanket finding of restricted access to candidacy, given recent elections of Orleans Parish Criminal Court Judges and Orleans Traffic Court Judges, blacks have crossed race lines.
>
> The Court further notes that there is no suggestion or record evidence of racial overtones or appeals in judicial or other elections, nor of a lack of responsiveness on the part of judges or other elected officials to the particularized needs of the members of the minority group.

[App. 42a].

The district court analyzed First Supreme Court District elections, finding that in the 1974, 1980 and 1988 primary and general elections "the candidate supported by a majority of black voters was elected in each instance." **[App. 45a]**. The district court also examined two 1972 First Supreme Court District races in which blacks had been candidates:

> Although no statistical evidence was presented concernir g the racial voting patterns in the 1972

> special election for the First Supreme Court District, a black candidate ran for both of the available seats. One candidate, Judge Ortique testified that there was a substantial number of blacks who crossed over and supported the white candidate. Judge Ortique received 27,648 votes (14.0%) in the First Supreme Court District and 21,744 votes (20.7%) in Orleans Parish. From the statistics that are available concerning the 1972 special election, it appears that there was a black crossover in the election for the second Supreme Court seat in the First District. In that election, Mr. Amedee, the only black candidate, received only 11,872 votes (5.8%) in the First Supreme Court District and 8,997 votes (8.5%) in Orleans Parish, revealing that there was even a greater black crossover vote than in the Ortique/Calogero race.
>
> Based upon the foregoing, the Court finds there is no pattern of racial bloc voting in the four most recent elections for Supreme Court Justice from the First Supreme Court District.

[App. 45a-46a].

The trial court also found there was no usual pattern of defeat for the black minority's preferred candidate in the 75 other judicial elections within the four parishes of the First Supreme Court District between 1978 and the present. **[App. 46a]**. Instead, the minority candidate of choice had been elected in 62.7% of the contested elections. **[App. 47a]**. The trial court concluded that:

> Ecological regression analyses for 34 judicial elections (24 primaries and 10 general elections) show that there is significant crossover voting among both white and black voters in judicial elections. A considerable number of black voters do not always support the black candidate, nor do the white voters always support the white candidate.

[App. 47a] (footnote omitted).

The trial court then examined exogenous elections, concluding:

> Cross-over voting by voters of one race to support candidates of another race is occurring increasingly in Orleans Parish elections for non-judicial offices indicating a pattern of both white and black voters to look at factors other than the race of candidates in making election choices.
>
> Cross-over voting by white voters to support black candidates for non-judicial offices in Orleans Parish occurs on a regular basis with the result that black candidates frequently win parish-wide offices such as mayor, councilman at-large, and school board posts.
>
> Roll-off in Orleans Parish judicial elections by black voters is sometimes large enough to prevent black candidates from winning elections in which white candidates participate.
>
> Moreover, black and white voters in Orleans Parish participate at approximately equal rates in recent elections for major office (President, U.S. Senate, Governor, and Mayor).

[App. 51a-52a].

After making all these findings, the district court made the following factual conclusion:

> Based upon the totality of circumstances before the Court, the Court is unable to find, and the plaintiffs, for the reasons hereinabove stated have failed to prove by a preponderance of the evidence as a factual matter, that a bloc voting majority is usually able to defeat candidates supported by a politically cohesive geographically insular minority group.

[App. 52a] (footnote omitted).

After undertaking a "searching practical evaluation of past and present reality," with a functional view of the "political process", **[App. 52a]**, the district court concluded: "[t]he Court is of the opinion plaintiffs have failed to prove by a preponderance of the evidence, the existence of racial bloc voting as a matter of law". **[App. 61a]**. The district court then stated:

> Plaintiffs would have the Court create an amoeba-shaped, wholly-metropolitan district unique among the Supreme Court districts in the state for the sole purpose of guaranteeing a black justice. In concluding, the Court stresses that the plaintiffs' goal appears wholly contrary to the express proviso in section 2 that "nothing in this section establishes a right to have [blacks] elected in numbers equal to their proportion in population.". . . . . .Proof of racially discriminatory intent or purpose is required to show a violation under either the fourteenth or fifteenth amendment. Plaintiffs have failed to prove as a matter of law that the present system by which Louisiana Supreme Court Justices are elected was instituted with specific intent to dilute, minimize or cancel the voting strength of plaintiffs. It is clear that an invidious discriminatory purpose was not a factor at all in the legislative decision to provide a multi-member district for the Louisiana First Supreme Court District. Such being the case, plaintiffs have failed to prove any constitutional violation from the operation of the present voting scheme.

[App. 62a-64a] (citations omitted).

CHISOM and the UNITED STATES filed separate appeals to the Fifth Circuit on the voting rights claim. Neither appealed the constitutional claims. This case and *League of United Latin American Citizens, et al. v. Clements, et al.* [*"LULAC"*] were both argued on April 30, 1990. The panel decided *LULAC* on May 11, 1990. 902 F.2d 293 (5th Cir. 1990). Four days later the Fifth Circuit *sua sponte* ordered an *en banc* hearing in *LULAC*. 902 F.2d 322 (5th Cir. 1990). The *LULAC en banc* court held that the results test as set forth in Section 2(b) could not be applied to the Texas state court judges because judges are not "representatives". 914 F.2d 620 (5th Cir. 1990) (*en banc*), *cert. granted*, ___ U.S. ___, 112 L.Ed.2d 838 (1991). **[App. 65a-99a]**. The *LULAC en banc* court also overruled *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988).

The Fifth Circuit then ordered this case remanded to the district court with instructions to dismiss all claims under the Voting Rights Act for failure to state a claim upon which relief may be granted. 917 F.2d 187 (5th Cir. 1990). **[App. 1a-3a]**.

On remand, the district court dismissed the voting rights claims of both CHISOM and the UNITED STATES, *Chisom v. Roemer*, 86-4075 (E.D. La. Sept. 13, 1989) (Order of Dismissal), whereupon each filed separate petitions with this Court for a Writ of Certiorari to the Fifth Circuit. Certiorari was granted as to each Petition on January 18, 1991, and the two cases were consolidated.

SUMMARY OF THE ARGUMENT

The original version of Section 2 of the Voting Rights Act of 1965 prohibited a state or a political subdivision thereof from imposing or applying any voting qualification, prerequisite to voting, or any standard, practice, or procedure which denied or abridged the right of any citizen of the United States to vote on account of race or color or language minority group membership. This section was coextensive with the Fifteenth Amendment to the United States Constitution. *City of Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980). ROEMER does not take the position that this Section 2 was inapplicable to state judicial electoral processes.

In amending Section 2 of the Voting Rights Act in 1982, Congress fashioned two separate and distinct standards by which vote dilution cases were to be tried. If the electoral system under challenge relates to the selection of members of the state judiciary or to issue oriented matters such as annexations, deannexations, referendums, taxation, bond issues, etc., discriminatory intent must be proven. On the other hand, if the electoral system under challenge relates to the selection of individuals who perform representative functions, such as legislators and executives, discriminatory results alone are sufficient to establish vote dilution.

Had Congress wanted to specifically include the election of state court judges within the results proof standard as set forth in Section 2(b) of the Voting Rights Act, Congress could have used a term such as "elected officials" or "candidates" rather than "representatives". Instead, however, Congress, itself a representative body, chose a word which Congress, of all institutions, would understand – "representatives" – a word which appears nowhere else in the Voting Rights Act. A judge is simply not a representative.

When Congress in confecting legislation uses language the meaning of which is clear and unmistakable, courts must consider such language conclusive when engaging in statutory construction.

This Court has held that judges are not "representatives". Lower federal courts have repeatedly reached the same conclusion. Further, throughout American history, legal scholars and historians have concluded that the concept of judges as "representatives" is foreign to the American political system. The judiciary is not expected to be nor may it be a mirror of public sentiment. Judges do not draw for their decisions from a public opinion poll, a dampened finger to the wind, or an ear to the ground. Their constituency is limited to the blindfolded lady with the sword and scales.

This Court has repeatedly held that Congress must expressly state any intention to alter the federal-state balance. Subjecting judges to Section 2(b) of the Voting Rights Act would, in the words of the *LULAC en banc* decision, strike "at federalism's jugular." No such express intention is evident in the 1982 amendment to the Act.

Further, had Congress intended to subject the judiciary to § 2(b), Congress would have addressed the difficult problems involved in such an application. There is no evidence that Congress considered the drastic changes that application of § 2(b) would make in the nature and functioning of a state's judiciary.

Making judges representatives in the same sense as are executives and legislators could destroy the independent role of the judiciary, a factor which is crucial to the proper functioning of a constitutional government. Public opinion rather than judicial opinion will become the hallmark of justice.

The "one man, one vote" standard has never been applied to the judiciary. On each occasion when the issue has been presented, this Court and other courts have uniformly held that the standard is not to be applied to the judiciary. Without the measure of individual voting strength provided in legislative cases by the one man, one vote rule, the first prong of *Thornburg v. Gingles*, 478 U.S. 30 (1986) – demonstration by the minority group "that it is sufficiently large and geographically compact to constitute a majority in a single-member district" – is meaningless in the judicial context. It is always possible to construct a geographically compact black voting majority district by continuing to reduce the total population in that district down to, if necessary, a minimum of one. There are no "judicially discernable and manageable standards" by which a court could find that a given judicial election system does *not* dilute minority voting strength if the population size of the hypothetical single-member subdistrict can be contracted or expanded at will. As one lower court has held, "An effort to apply a population standard to the judiciary would, in the end, fall of its own weight." *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964).

The most that can be said about the relationship of Section 5 of the Voting Rights Act (which was enacted by Congress in 1965 and extended without change in 1982) and Section 2(b) (which was enacted by Congress seventeen years later in 1982) is that they both form a part of the Voting Rights Act, as amended. The test for the application of each is entirely different. This distinction is readily understandable for Congress created the sections at different times and for different purposes. Senator Robert Dole, the author of the compromise language which became Section 2(b), stated during the Senate

Hearings that the "effects" test in Section 5 was different from the "results" test in Section 2(b).

ARGUMENT

I. Congress Did Not Intend Section 2(b) Of The Voting Rights Act Amendments Of 1982 To Apply To The Judiciary.

A. Section 2 Of The Voting Rights Act Of 1965 Sets Forth An Intentional Discrimination Standard.

Section 2 of the Fifteenth Amendment to the Constitution granted Congress the power to enforce the Fifteenth Amendment by appropriate legislation. This Congress did by the passage of the Voting Rights Act of 1965. The original version of Section 2 prohibited a state or a political subdivision thereof from imposing or applying any voting qualification, prerequisite to voting, or any standard, practice, or procedure which denied or abridged the right of any citizen of the United States to vote on account of race or color or language minority group membership. This Court has held that Section 2 did not reach beyond the Fifteenth Amendment to the United States Constitution, stating: "[T]he language of § 2 no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself." *City of Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980). *City of Mobile* also held "that racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation." *Id.* at 62, *citing Gomillion v. Lightfoot*, 364 U.S. 339 (1960). The Fifteenth Amendment and the original Section 2 were both clearly applicable to the judiciary and to all other elective processes. ROEMER does not take the position that Section 2 of the Voting Rights Act as initially enacted is inapplicable to state judicial electoral processes.

B. Section 2(b) Of The Voting Rights Act Amendments Of 1982 Sets Forth A "Results" Test Which Is Applicable Only To The Choice Of "Representatives".

In 1982 Congress amended the Voting Rights Act, creating two alphabetized subsections. The first, designated "(a)", restated the test of the original Section 2 which prohibited a state or a political subdivision thereof from imposing or applying any voting qualification, prerequisite to voting, or any standard, practice, or procedure which denied or abridged the right of any citizen of the United States to vote on account of race or color or language minority group membership. This language, like the original Section 2, is coterminous with the Fifteenth Amendment. Under subsection "(a)" the intent standard thus remains unchanged. 42 U.S.C. § 1973(a).

The second alphabetical subsection "(b)" created a new and additional standard of proof, which relaxed the intent standard of proof as required in subsection "(a)", by providing a "results" test for elections involving the choice of "representatives". Section 2(b) of the Voting Rights Act, 42 U.S.C. § 1973(b), states:

> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a

> protected class elected in numbers equal to their proportion in the population.

Justice O'Connor noted in her concurring opinion in *Thornburg v. Gingles*, 478 U.S. 30 (1986), that "[a]mended § 2 is intended to codify the "results" test employed in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), and to reject the "intent" test propounded in the plurality opinion in *City of Mobile v. Bolden*, 446 U.S. 55 (1980)." 478 U.S. at 83. In adopting this "results" standard in Section 2(b), Congress drew upon this Court's decision in *White v. Regester*, 412 U.S. 755 (1973), for the applicable language.[7] This language was inserted by Senator Dole as a compromise.[8] A

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[7] The Senate Report states:

> The amendment to the language of Section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system of practice in order to establish a violation. Plaintiffs must either prove such intent, or, alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process.
>
> . . . .
>
> In adopting the "result standard" as articulated in *White v. Regester*, the Committee has codified the basic principle in that case as it was applied prior to the *Mobile* litigation.

Voting Rights Act Amendments of 1982, S.Rep. No. 97-417, 97th Cong., 2d Sess. 27, 28, *reprinted in* 1982 U.S. Code Cong. & Admin. News 205.

[8] *See Voting Rights Act: Hearings Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112*, 97th Cong. 2d Sess. Vol. II, pp. 80-81 (May 4, 1982).

comparison of the language in *White* and that in Section 2(b) is set forth below:

White v. Regester	*Section 2(b)*
The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question – that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.	A violation of subsection (a) of this section is established if, based upon the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or elections in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity to participate in the political process and elect representatives of their choice.

By amending Section 2 of the Voting Rights Act, Congress fashioned two separate and distinct standards by which vote dilution cases were to be tried. If the electoral system under challenge relates to the selection of members of the state judiciary or to issue-oriented matters such as annexations, deannexations, referendums, taxation, bond issues, etc., discriminatory intent must be proven. On the other hand, if the electoral system under challenge relates to the selection of individuals who perform representative functions, such as executives and legislators, discriminatory intent can, but need not be proven, for discriminatory results alone are sufficient to establish vote dilution.

1. Where Statutory Language Is Clear, A Court Must Adopt The "Plain Meaning" Of A Statute.

Congress thus changed the word "legislators" in *White* to "representatives" in Section 2(b), "a term which is employed only at this spot and appears nowhere else in the entire Voting Rights Act." *LULAC* (*en banc*), 914 F.2d at 628. Congress, had it wanted specifically to include judges under Section 2(b) of the Voting Rights Act, could have done so by substituting the term "candidate" which appears elsewhere in the Act[9] for the term "representatives" which appears only in Section 2(b).

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[9] Other sections of the Voting Rights Act consistently use the term "candidate" in generically referring to all those standing for elections:

> "No person . . . shall intimidate, threaten, coerce, . . . [any] person to vote for, or not to vote for, any candidate . . . at any general, special or primary election held solely or in part for the purpose of selecting or electing any such candidate." 42 U.S.C. § 1971(b).
>
> "When used in this subsection, the word 'vote' includes all action necessary to make a vote effective . . . with respect to candidates for public office." 42 U.S.C. § 1971(e).
>
> "The prohibition of this subsection applies with respect to any general, special, or primary election held solely or in part for the purpose of selecting or electing any candidate . . . " 42 U.S.C. § 1973(i)(e)(2).
>
> "The terms 'vote' or 'voting' shall include all actions necessary to make a vote effective in any primary, special, or general election, including, but not limited to . . . having [a] ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office . . . " 42 U.S.C. § 1973(l)(c)(1).

In construing the statutory language, in this case the meaning of the term "representatives", this Court has held repeatedly that there is no need to resort to an examination of legislative history when the statutory language is clear and unmistakable.[10] Examples of such holdings include:

> We are not at liberty to construe language so plain as to need no construction, or to refer to committee reports where there can be no doubt

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[10] The majority opinion in *LULAC* (*en banc*) recognized that the legislative history was of no real help:

> Thus, as Justice Scalia has very recently suggested, we "appl[y] to the text of the statute the standard tools of legal reasoning, instead of scouring the legislative history for some scrap that is on point. . . . " *Begier v. I.R.S.*, ___ U.S. ___, 110 S.Ct. 2258, 2269, 110 L.Ed.2d 46, 63 (1990) (concurrence in judgment).
>
> And these small matters are indeed scourings. The panel opinion avers, 902 F.2d at 299, and we do not doubt, that the reference to "judicial districts" is the sole reference to the judiciary in all the legislative history of the 1982 amendments of the Act. It will be noted that even this reference is one to judicial *districts*, not to judicial candidates; and in our Circuit many officials such as sheriffs, highway commissioners, district attorneys and clerks of court, who are "representatives" and not judges, are elected from judicial districts, *e.g.*, Miss.Code Ann. (1972) 65-1-3.

914 F.2d at 630 n.14 (emphasis in original). The only reference to "judicial districts" was in a subcommittee report hostile to the amendments. 914 F.2d at 630. "This Court does not usually accord much weight to the statements of a bill's opponents." *Shell Oil Co. v. Iowa Department of Revenue*, 488 U.S. 19, 29 (1988); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 483 (1981); *Holtzman v. Schlesinger*, 414 U.S. 1304, 1312 n.13 (1973) (Marshall, J., in chambers); *see also Kelly v. Robinson*, 479 U.S. 36, 50 n.12 (1986) ("We decline to accord any significance to these statements [by witnesses in hearings]").

of the meaning of the words used. *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85, 89 (1935).

[T]here is no need to refer to the legislative history where the statutory language is clear. . . . "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Ex Parte Collett*, 337 U.S. 55, 61 (1949) (citations omitted).

We must adopt the plain meaning of a statute, however severe the consequences. *Jay v. Boyd*, 351 U.S. 345, 357 (1956).

We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. *Consumer Products Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980).

Since it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses, we have often stated that "[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive." *Escondido Mut. Water Co. v. La Jolla Indians*, 466 U.S. 765, 772 (1984).

[W]e state once again the obvious when we note that, in determining the scope of a statute, one is to look first at its language. . . . If the language is unambiguous, ordinarily it is to be regarded as conclusive unless there is "a clearly expressed legislative intent to the contrary." *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 110 (1983) (citations omitted).

There is a ready starting point, which ought to serve also as a sufficient stopping point, for this kind of analysis: the plain language of the statute. *Public Citizen v. Department of Justice*, 491 U.S. 440, 469 (1989) (Kennedy, Rehnquist, and O'Connor, JJ., dissenting).

The question thus becomes whether the term "representatives" is unambiguous. It would, indeed, be difficult to cast about for a word whose meaning was less in doubt than that selected by Congress as a substitute for "legislators" when Congress chose the word "representatives", a word of simple interpretation and one used extensively by Congress in the enactment of legislation.

Had Congress been in doubt as to the meaning of its selected term, Congress could have turned to any dictionary, or thesaurus, for the word's meaning or synonym. For example, one dictionary published a year before the 1982 amendments defines "representative" as "one that represents a constituency as a member of a legislative or other governing body." *Webster's Third New International Dictionary*, 1926 (1981).

2. This Court Has Held That The "Plain Meaning" Of "Representatives" Does Not Include "Judges".

The majority in *LULAC* (*en banc*) held that Congress knew that judges are not considered to be "representatives":

> By the settled canon of construction, we must presume that Congress was aware of the uniform construction which had been placed by the courts on the term that it selected, a construction by which the judicial office was not deemed a "representative" one. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 108 S.Ct. 1704, 100 L.Ed.2d 158 (1988); *Sutton v. United States*, 819 F.2d 1289 (5th Cir. 1987). Against this background, then, the Congress deliberately picked a term of art for use in amending Section 2 that up to that time had been universally held, and which it *knew* had been universally held by every federal court that had considered it as of that date, neither to include judges nor to comprise judicial offices.

914 F.2d at 628 (emphasis in original).

This Court held that judges are not "representatives" in affirming a three-judge court voting rights decision

that the "one man, one vote" concept does not apply to the judiciary. *Wells v. Edwards*, 409 U.S. 1095 (1973). In refusing to apply "one man, one vote" precepts, the three-judge court reasoned as follows:

> [A]s stated in Buchanan v. Rhodes [249 F. Supp. 860 (N.D. Ohio 1960), *appeal dismissed*, 385 U.S. 3 (1966)]:
>
> "Judges do not represent people, they serve people." Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary.
>
> "The State judiciary, unlike the legislature, is not the organ responsible for achieving representative government." New York State Association of Trial Lawyers v. Rockefeller, 267 F.Supp. 148, 153.

Wells v. Edwards, 347 F. Supp. 453, 455-56 (M.D. La. 1972) (three-judge court).

Similarly, Justice Frankfurter has stated: "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society." *Dennis v. United States*, 341 U.S. 494, 575 (1951) (Frankfurter, J., concurring in the judgment). Justice Stewart has contrasted the Court's duty with that of the people's representatives:

> It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected *representatives* to repeal it.

Griswold v. Connecticut, 381 U.S. 479, 530-31 (1965) (Stewart, J., dissenting) (emphasis supplied).

The judiciary is not intended to be representative of and responsive to the populace; instead, the judiciary is required to be independent of pressures of any constituency or interest group. The need for such independence

has been the reason for holding judges immune for performing judicial acts. *See, e.g., Butz v. Economou*, 438 U.S. 478, 508-09 (1978); *Stump v. Sparkman*, 435 U.S. 349, 355 (1978); *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872). The authors of the U.S. Constitution created such independence in the federal judiciary:

> The Federal Judiciary was therefore designed by the Framers to stand independent of the Executive and Legislative – to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication remained impartial.
>
> . . . .
>
> In sum, our Constitution unambiguously enunciates a fundamental principle – that the "judicial Power of the United States" must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provided clear institutional protections for that independence.

Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58, 60 (1982). More recently, this Court stated that "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989).

3. Other Federal Courts Have Held That The "Plain Meaning" Of "Representatives" Does Not Include "Judges".

As stated, this Court has held that judges are not representatives. Other federal courts have repeatedly reached a similar conclusion. The plaintiffs in *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971) (three-judge court), attacked the North Carolina system of nominating judges by districts and electing them statewide, contending that it denied voters equal protection of the laws, citing, inter alia, *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533 (1964). The court distinguished these and other cited cases because they "dealt

with the election of the representatives of the people – officials who make laws, levy and collect taxes, and generally manage and govern people." 335 F. Supp. at 930. After discussing two precedents involving reapportionment, the court stated:

> While *Buchanan [v. Rhodes,* 249 F. Supp. 860 (N.D. Ohio 1960), *appeal dismissed,* 385 U.S. 3, 87 S.Ct. 33, 17 L.Ed.2d 3 (1966)] and [*New York State Association of Trial Lawyers v.] Rockefeller* [267 F. Supp. 148 (S.D.N.Y. 1967)], deal with the apportionment of judges rather than their election, they nevertheless point up the many pitfalls and briar patches which the courts will encounter if the one man, one vote principle is made applicable to the judiciary. The function of judges, contrary to some popular views of today, is not to make, but interpret the law. They do not govern nor represent people nor espouse the cause of a particular constituency. They must decide cases exclusively on the basis of law and justice and not upon the popular view prevailing at the time.

335 F. Supp. at 932. The *Holshouser* decision was affirmed by this Court. 409 U.S. 807 (1972).

A similar system of electing judges in Georgia was upheld in *Stokes v. Fortson,* 234 F. Supp. 575 (N.D. Ga. 1964) (three-judge court). The court stated:

> [E]ven assuming some disparity in voting power, the one man-one vote doctrine, applicable as it now is to selection of legislative and executive officials, does not extend to the judiciary. Manifestly, judges and prosecutors are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency. Moreover there is no way to harmonize selection of these officials on a pure population standard with the diversity in type and number of cases which will arise in various localities, or with the varying abilities of judges and prosecutors to dispatch the business

> of the courts. An effort to apply a population standard to the judiciary would, in the end, fall of its own weight.

234 F. Supp. at 577.

In two New York cases plaintiffs sought judicial reapportionment on the basis of population, again relying on legislative reapportionment cases. In *New York State Association of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148 (S.D.N.Y. 1967), the court rejected the comparison, stating that:

> The state judiciary, unlike the legislature, is not the organ responsible for achieving representative government. Nor can the direction that state legislative districts be substantially equal in population be converted into a requirement that a state distribute its judges on a per capita basis.
>
> . . . .
>
> In contrast to legislative apportionment, population is not necessarily the sole, or even the most relevant, criterion for determining the distribution of state judges. The volume and nature of litigation arising in various areas of the state bears no direct relationship to the population of those areas.

267 F. Supp. at 153-54; *accord, Kail v. Rockefeller*, 275 F. Supp. 937, 941 (E.D.N.Y. 1967) (three-judge court) (quoting the *Trial Lawyers* opinion's statement that the state judiciary is not "responsible for achieving representative government").

The Ohio judicial structure guaranteeing each county at least one judge in the court of general jurisdiction came under attack in *Buchanan v. Rhodes*, 249 F. Supp. 860 (N.D. Ohio 1966), *appeal dismissed*, 385 U.S. 3 (1966), *vacated*, 400 F.2d 882 (6th Cir. 1968), *cert. denied*, 393 U.S. 839 (1968). Once again, the complaint was predicated upon the Supreme Court's reapportionment cases. The court noted that when representatives to a legislative body are malapportioned, the voting strength of individual citizens becomes unequal, causing a dilution of power. 249 F.

Supp. at 865. Judges, however, are not governed by such a rule:

> But in determining the reasonableness of a judicial system which permits at least one judge operating a court of general jurisdiction in each county, we must recognize one glaring distinction between the functions of legislators and the functions of jurists. Judges do not represent people, they serve people.

249 F. Supp. at 865.[11]

Less than four months after a panel for the United States Court of Appeals for the Fifth Circuit decided that judges were "representatives" when the *Chisom* case was first before the Fifth Circuit, *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988), another panel of the Fifth Circuit held that judges are not "representatives":

> Of course, Mr. Hatten is running for judge. Judges, even if elected, do not serve a primarily representative function.

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[11] Other decisions making a similar distinction between judges and representative officials include *Gilday v. Board of Elections of Hamilton County*, 472 F.2d 214, 217 (6th Cir. 1972) (rejecting application of the one man, one vote concept to judicial selection in Ohio); *Sagan v. Commonwealth of Pennsylvania*, 542 F. Supp. 880, 882 (W.D. Pa. 1982) (distinguishing judicial candidates from legislative and executive candidates because judges administer the law rather than espouse the cause of a particular constituency); *Fahey v. Darigan*, 405 F. Supp. 1386, 1391 n.6 (D.R.I. 1975) (holding one man, one vote precepts inapplicable to "the selection of officials not intended to serve in a representative role, such as judges"); *Buchanan v. Gilligan*, 349 F. Supp. 569, 571 (N.D. Ohio 1972) (three-judge court) (rejecting application of one man, one vote to Ohio judiciary because "[t]he state judiciary is not responsible for achieving representative government"); *Romiti v. Kerner*, 256 F. Supp. 35, 46 (N.D. Ill. 1966) (three-judge court) (expressing "little doubt" that "there is a valid distinction between applying the 'one man, one vote' rule in a legislative apportionment case to the election of a state supreme court judiciary").

Hatten v. Rains, 854 F.2d 687, 696 (5th Cir. 1988). The concurrence added, "As Judge Goldberg says, judges are not representatives". *Id.* at 696. (Garwood and Jolly, specially concurring).

4. The Fundamental Difference Between "Representatives" And Members Of The Judiciary Is Deeply Rooted In This Country's History.

In holding that "the judiciary serves no representative function whatsoever," 914 F.2d at 625, the *LULAC en banc* Court quoted Professor Eugene Hickok's statement that, "The judiciary occupies a unique position in our system of separation of powers, and that is why the job of a judge differs in a fundamental way from that of a legislator or executive." E. Hickok, "Judicial Selection: The Political Roots of Advice and Consent" in *Judicial Selection: Merit, Ideology and Politics* 5 (National Legal Center for the Public Interest 1990), *quoted at* 914 F.2d at 926. Other scholars have also recognized this difference.

Professor G. Edward White wrote in *The American Judicial Tradition* that the American judicial tradition emerged with Chief Justice John Marshall.[12] A core element of that tradition has always included "a measure of true independence and autonomy for the appellate judiciary from the other two branches of government." *Judicial Tradition* 9. Professor White added:

> An independent judiciary was logically the ultimate necessity in Marshall's jurisprudence, the culmination of his beliefs about law and government. He sought to show that judicial independence was not merely a side effect of federalism but a first principle of American civilization. . . . Against the potential chaos attendant on mass participatory democracy, republicanism erected

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[12] Citations are hereinafter abbreviated as *Judicial Tradition*. Page references refer to the 1978 Oxford University Press paperback edition.

> the institutional buffers of legislative representatives and an independent judiciary. The excesses of the people were moderated by representation, a process by which their passionate demands were reformulated by an enlightened and reasonable class of public servants. The need of the populace for an articulation of their individual rights under law was met by the presence of a body of judges not beholden to the masses in any immediate, partisan sense.

Judicial Tradition 18, 20.

Another Founding Father, Alexander Hamilton, "envisaged judicial review as an exercise in politics through which an independent judicial elite could temper the democratic excesses of legislatures by affirming the republican political balances inherent in the Constitution." *Judicial Tradition* 24. Some of the Founding Fathers thought an independent judiciary necessary because "even a government made up of the people's representatives was not a sufficient buffer against the excesses of the mob." *Judicial Tradition* 320.

This American judicial tradition has also been applicable to the state judiciary. State constitutions "were patterned on the federal Constitution, with its tripartite division of powers." *Judicial Tradition* 109. James Kent, Chief Judge of the New York Supreme Court and later Chancellor of New York, "viewed the judiciary as a buffer between established wealth and the excessively democratic legislature." *Judicial Tradition* 112. Chief Justice Roger Traynor of the California Supreme Court wrote that judges "enjoyed a 'freedom from political and personal pressures and from adversary bias' [and that] [t]heir 'environment for work' was 'independent and analytically objective.' " *Judicial Tradition* 296, *quoting* Traynor, "Badlands in an Appellate Judge's Realm of Reasons," 7 Utah L.Rev. 157, 167, 168 (1960).

Professor White traced "modern liberalism" trends throughout the Twentieth Century. According to this

political theory, judges "were not, by and large, representatives of the people, and their nonpartisan status insulated them from the waves of current opinion." *Judicial Tradition* 320. By contrast, legislatures "were 'representative of popular opinion' and could 'canvass a wide spectrum of views.' " *Judicial Tradition* 322. Justice Felix Frankfurter has called the judiciary the "antidemocratic, unrepresentative" branch of government. *Judicial Tradition* 367.[13]

Various legal theorists have also stated that judges are not "representatives." In *Democracy and Distrust*[14] Professor John Hart Ely contrasted the function of the courts with the role of the representative branch of government, the legislative branch. He sought an approach to judicial review "not hopelessly inconsistent with our nation's commitment to representative democracy." *Democracy and Distrust* 41. Professor Ely developed a representation-reinforcing theory of judicial review in which the non-representative branch (the judiciary) would review legislation to review the motivation of the representative branch (the legislature) to make sure that the views of all groups were represented in lawmaking. He concluded: "constitutional law appropriately exists for those situations where representative government cannot be trusted." *Democracy and Distrust* 183.

In *The Supreme Court and the Idea of Progress*[15] Professor Alexander Bickel spoke of the importance of judicial independence:

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[13] Professor Lawrence Friedman also has written about the history of a strong, independent judiciary in both federal and state governmental systems. L. Friedman, *A History of American Law* 116, 118 (Simon & Schuster 1973 paperback edition).

[14] Page references are to the 1980 Harvard University Press hardbound edition.

[15] Citations are hereinafter abbreviated as *Supreme Court and Progress*. Page references refer to the 1978 Yale University Press paperback edition.

> The restraints of reason tend to ensure also the independence of the judge, to liberate him from the demands and fears – dogmatic, arbitrary, irrational, self- or group-centered – that so often enchain other public officials. . . . The independence of the judges is an absolute requirement if individual justice is to be done, if a society is to ensure that individuals will be dealt with in accordance with duly enacted policies of the society, not by the whim of officials or of mobs, and dealt with evenhandedly, under rules that would apply also to others similarly situated, no matter who they might be.

Supreme Court and Progress 82, 84.

Professor Bickel contrasted the Court with the people and its representatives, stating, "Virtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives." *Supreme Court and Progress* 91.[16]

Last month, in discussing appointments to the federal bench, former U.S. Court of Appeals Judge Robert Bork stated, "[t]he courts are not supposed to be representative institutions." 77 *ABA Journal* 20 (March 1991).

5. This Court Has Repeatedly Held That Congress Must Expressly State Its Intention when Passing Legislation Altering The Federal-state Balance, And Making Section 2(b) Applicable To The Judiciary Would Constitute Such An Alteration.

Making state elected judges subject to a constituency would constitute drastic federal interference with the current role of such judges and would remove their independence. This Court has stated that Congress must

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[16] Never in Professor Bickel's lengthy section on reapportionment is there any intimation that reapportionment requires judicial redistricting. *Supreme Court and Progress* 35, 158-59, 168-73. Indeed, such a notion would run counter to his strong arguments for judicial independence.

expressly state its intention when passing legislation altering the federal-state balance. *See, e.g., Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985); *Garcia v. San Antonio Metro Transit Authority*, 469 U.S. 528, 549-50 (1985); *Trainor v. Hernandez*, 431 U.S. 434, 441 (1977); *O'Shea v. Littleton*, 414 U.S. 488 (1974); *United States v. Bass*, 404 U.S. 336, 349 (1971); *Greenwood v. Peacock*, 384 U.S. 808 (1966).

Less than two years ago, this Court in *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), cited with approval this Court's statement in *United States v. Bass*, 404 U.S. 336, 349 (1971):

> that "[I]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."

491 U.S. at 65.

The *LULAC en banc* decision stated that no such "clear statement" could be found in § 2(b):

> It is hard to envision any area lying closer to the core of state concerns than the process by which it selects its own officers and functionaries. Any federal trenching here strikes at federalism's jugular; and such a radical federal trenching as is contended for today should therefore demand a very clear statement indeed. Instead, as regards the issue in this case, our investigation reveals an all but total absence of relevant legislative history and a statutory text that unambiguously excludes elections of non-representative state officers from Section 2's highly intrusive results test. If this was not the intended effect of Congress's substitution of *representatives* for *legislators* in Justice White's language, no other suggests itself; and we must reject any notion that Congress went to all the trouble of selecting that language and carefully modifying it, just so far and no further, randomly and with nothing particular in mind. It is

> never proper for us to extend a statute's force by construction into areas where Congress has not seen fit or has been unable to agree to go, and never less proper than in such supremely sensitive territory as this.

914 F.2d 620, 630-31 (5th Cir. 1990).[17]

6. Had Congress Intended To Make Section 2(b) Applicable To Judges, Congress Would Have Addressed The Difficult Problems Involved In Such An Application.

As the lower courts have recognized in their decisions,[18] judges do have a unique position in our governmental system and application of Section 2(b) of the Voting Rights Act to the judiciary poses special problems. The Justice Department has also recognized this unique role of the judiciary and repeatedly demonstrated discomfort with the notion that judges ought to be treated like everyone else under Section 2(b) of the Voting Rights Act.[19] Surely if Congress had intended that Section 2(b) of

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[17] *Thornburg v. Gingles*, 478 U.S. 30 (1986), is this Court's definitive opinion on the meaning and scope of § 2(b). In *Thornburg*, this Court did not consider Congress's use of the word "representatives" to be random and superfluous; indeed, the Court used the term often in delineating its opinion. *See, e.g.*, 478 U.S. at 35, 41, 46, 48 n.14, 51, and 73.

[18] *See, e.g., Clark v. Edwards*, 725 F. Supp. 285, 294 (M.D. La. 1988); *Martin v. Mabus*, 700 F. Supp. 327, 332 (S.D. Miss. 1988) ("The basic tenets in remedying violations for legislative districts as set forth in the body of case law are applicable to this case, but the Court finds that there are additional considerations in judicial cases that require greater emphasis on some factors").

[19] In an amicus brief filed with the Fifth Circuit when this case was first before that court, *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988), the Justice Department said:

(Continued on following page)

the Voting Rights Act would apply to judges, Congress would have debated at length the difficult problems, including the difficult remedy problems, that immediately arise in the application of Section 2(b) to the judiciary.[20]

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> None of this is to say, however, that judicial elections are covered by Section 2 in precisely the same way as other elections are. The differing function of judges from other elected officials makes different the range of factors to be considered in determining if a Section 2 violation has occurred. . . . The precise range of the difference in treatment between judges and other officials raises difficult problems.

pp. 19, 20. Similarly, in its Brief on the Merits in this case, the United States writes:

> Since courts do and should stand above politics, the argument goes, the Voting Rights Act should not be read in a manner that treats the judiciary in the same manner as the legislative and executive branches.
>
> That argument, we believe, is a powerful one. . . . It is also fair to assume that Congress was aware of the unique role that the courts play in our democratic form of government.

p. 34.

[20] This Court held as follows concerning the significance of the absence of Congressional debate on another sensitive area involving the federal-state balance, the overriding of sovereign immunity:

> Given the importance of the States' traditional sovereign immunity, if in fact the Members of the 42d Congress believed that § 1 of the 1871 Act overrode that immunity, surely there would have been lengthy debate on this point and it would have been paraded out by the opponents of the Act along with the other evils that they thought would result from the Act. . . .

(Continued on following page)

These remedy problems have not been addressed in *Chisom* because the district court ruled in favor of the defendants after a trial on the merits. The remedy problems have been discussed at length in a lawsuit challenging the at-large selection of district judges and court of appeals judges in Louisiana. *Clark v. Edwards*, 725 F. Supp. 285, 287 (M.D. La. 1988). Section 5 aspects of *Clark* are before this Court,[21] and a petition for certiorari concerning the Section 2 aspects of the *Clark* case is pending.[22]

The usual judicially-imposed remedy in Section 2(b) and reapportionment cases involving an at-large elected system has been to elect the governmental entity by single-member districts.[23] Use of single-member judicial

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> We can only conclude that this silence on the matter is itself a significant indication of the legislative intent of § 1.

Quern v. Jordan, 440 U.S. 332, 343 (1979).

[21] *Clark v. Roemer, jurisdiction noted*, ___ U.S. ___, 112 L.Ed.2d 838 (1990).

[22] *Clark v. Roemer, petition for cert. filed*, 59 U.S.L.W. (U.S. Dec. 7, 1990) (90-898).

[23] "We have frequently reaffirmed the rule that when United States district courts are put to the task of fashioning reapportionment plans to supplant concededly invalid state legislation, single-member districts are to be preferred absent unusual circumstances." *East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636, 639 (1976); *accord, Connor v. Finch*, 431 U.S. 407, 414, 415 (1977); *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975). "We are fully persuaded, however, that the same considerations which have induced this Court to express a preference for single-member districts in court-ordered reapportionment plans designed to remedy violations of the one-person, one-vote rule compel a similar rule with regard to court-imposed reapportionments designed to cure the dilution of the voting strength of racial minorities resulting from unconstitutional racial discrimination." *Wise v. Lipscomb*, 437 U.S. 535, 541 n.5 (1978).

sub-districts, however, poses almost insuperable problems, as *Clark* demonstrates. The plaintiffs in that lawsuit proposed as their preferred remedies multi-member sub-districts or single-member sub-districts. Ultimately, the district judge chose sub-districts as the remedy. *Clark v. Roemer*, No. 86-435 (M.D. La. June 12, 1990) (Findings of Fact and Conclusions of Law Remedy Stage, p. 52). The judge pointed out some of the problems inherent in such a remedy:

> Creation of such subdistricts obviously generates other problems, such as compactness, equality of population, need for future modification because of additional judgeships or population changes and the potential or perceived potential for small election districts leading to "home town" justice, to name a few.

Clark v. Roemer, No. 86-435 (M.D. La. June 12, 1990) (Findings of Fact and Conclusions of Law Remedy Stage, p. 49).

All of these problems are serious. Possibly the most difficult to solve are the problems involved with the "need for future modification because of additional judgeships or population changes." The sub-districts drawn in *Clark* were based on population and voting age population figures. Changes in population and the racial composition of population in sub-districts will inevitably occur. Thus, what may be a minority sub-district today may not be a minority sub-district tomorrow, requiring periodic redrawing of sub-district lines. Further, judges may fear that as such redrawings occur, they will be placed in the same sub-district and forced to run against each other. They might therefore compete with one another to make sure that they do not write unpopular opinions.

Further redrawing will be necessary as judges are added. Most governmental bodies (such as city councils, county governments, school boards, and the like) remain the same size. Judges, however, are added as the caseloads increase. *Clark v. Edwards*, 725 F. Supp. 285 (M.D.

La. 1988).[24] If judges are elected from single-member sub-districts, each time a judge is added in a judicial district, all of the sub-districts will have to be redrawn.[25]

The district judge in *Clark* also mentioned the problem of actual or perceived "home town" justice, meaning that the electorate for a sub-district will be much smaller than the electorate for a judicial district, and that there will be the appearance (and possibly the reality) of "neighborhood judges" who are influenced by their constituency and the source of their campaign funds. Because of a fear of "home-town cooking", litigants may understandably opt more often for jury trials, clogging the court docket and slowing down the judicial process, as well as creating the need for more judges. And, as judges are added, lines will need to be re-drawn making the sub-districts smaller, which then increases the "neighborhood judge" problem so that more litigants will

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[24] Redrawing of sub-districts could conceivably mean that two federal courts would continue to supervise a state's judiciary. Presumably, the district court in which the Section 2 lawsuit was brought would retain jurisdiction for re-drawing because of population changes and changes in the racial composition of the population in the districts and sub-districts. This Court has affirmed a three-judge court opinion that addition of new judges requires preclearance under Section 5 of the Voting Rights Act. *Brooks v. Georgia State Board of Elections*, No. C.V. 288-146 (S.D. Ga. Dec. 1, 1989) (three-judge court), *aff'd mem.*, ___ U.S. ___, 112 L.Ed.2d 243 (1990). Disagreements between a state and the Department of Justice regarding the appropriateness of adding the prospective judge and redrawing of existing sub-districts because of the addition of the new judge would be heard by the United States District Court for the District of Columbia. *See* 42 U.S.C. § 1973c.

[25] Even with multi-member sub-districts, as a judge is added, the population per judge across the sub-districts within a district will no longer be approximately equal, so the lines will have to be withdrawn.

choose a jury trial – in short, creating a vicious (and extremely expensive) circle.

Another remedy suggested in *Clark* is limited voting. Under limited voting a voter can only vote for some of the positions on the ballot. Such a system would itself appear to violate the Voting Rights Act, which provides that nothing in the applicable subchapters "shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision." 42 U.S.C. § 1973n.[26] Limited voting was rejected as a judicial remedy in Voting Rights Act cases, including *McGhee v. Granville County*, 860 F.2d 110 (4th Cir. 1988), and *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988).[27] Further, the district judge in *Clark* rejected it as a Section 2 remedy, after hearing uncontested testimony that it exists in only approximately 200 of the more than 86,000 local governmental units in this country. *Clark v. Roemer*. No. 86-435 (M.D.La. June 12, 1990) (Findings of Fact and Conclusions of Law Remedy Stage, pp. 51-52.)

Surely had Congress intended that the judiciary was to be covered by Section 2(b), Congress would have adverted to some or all of the problems listed above.

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[26] As Chief Judge Parker held in rejecting limited voting for the alleged Section 2 violations in Louisiana's judicial system, "this court finds it difficult to comprehend how we expand access to the ballot box by limiting the number of votes each elector may cast." *Clark v. Roemer*, No. 86-435 (M.D. La. June 12, 1990) (Findings of Fact and Conclusions of Law Remedy Stage, p. 52).

[27] Pennsylvania has determined that limited voting for judges violates its Constitution. *Mezvinsky v. Davis*, 459 A.2d 307 (Pa. 1983).

II. As Long As This Court Holds That The "One Man, One Vote" Principle Does Not Apply To State Judicial Electoral Selection Processes, The Vote Dilution Proof Concept Enshrined In Section 2(b) Of The Voting Rights Act, As Interpreted And Applied In *Thornburg v. Gingles*, 478 U.S. 30 (1986), Cannot Apply To The Judiciary.

Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972) (three-judge court), *affirmed*, 409 U.S. 1095 (1973), rejected application of the "one man, one vote" test to the judiciary. The district court in *Wells* held as follows:

> [A]s stated in Buchanan v. Rhodes [249 F. Supp. 860 (N.D. Ohio 1960), *appeal dismissed*, 385 U.S. 3, 87 S.Ct. 33, 17 L.Ed.2d 3 (1966)]:
>
> "Judges do not represent people, they serve people." Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary.
>
> "The State judiciary, unlike the legislature, is not the organ responsible for achieving representative government." New York State Association of Trial Lawyers v. Rockefeller, 267 F. Supp. 148, 153.

347 F. Supp. at 455-56; *accord*, *Holshouser v. Scott*, 335 F. Supp. 928, 932 (M.D.N.C. 1971) (three-judge court), *aff'd. mem.*, 409 U.S. 807 (1972); *Kail v. Rockefeller*, 275 F. Supp. 937, 941 (E.D.N.Y. 1967) (three-judge court); *New York State Association of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148, 153-54 (S.D.N.Y. 1967); *Buchanan v. Rhodes*, 249 F. Supp. 860, 865 (N.D. Ohio 1966), *appeal dismissed*, 385 U.S. 3 (1966), *vacated*, 400 F.2d 882 (6th Cir. 1968), *cert. denied*, 393 U.S. 839 (1968); *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964) (three-judge court).

The express language of the plurality opinion in *Thornburg*, as well as that of the concurring opinions, shows that Section 2(b) of the Voting Rights Act enshrines the "one man, one vote" principle as the touchstone test for determining vote dilution. In speaking for the

plurality, Justice Brennan set forth a three-part test for determining what type of evidence is necessary under Section 2(b) to prove a violation:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as a minority candidate running unopposed . . . usually to defeat the minority's preferred candidate. . . . In establishing this last circumstance, the minority group demonstrates that the submergence in a white multi-member district impedes its ability to elect its chosen representatives.

478 U.S. at 50-51.

This test requires an analysis of vote dilution by use of a hypothetical single member district, a district which must meet a one man, one vote test.

As Justices O'Connor, Powell, Rehnquist, and Chief Justice Burger recognized in their concurring opinion in *Thornburg*, this three-fold test (and its implicit one man, one vote standard) equates to a requirement of proportional representation, i.e., one man, one vote. Justice O'Connor, speaking for these Justices, stated:

> Third, although the Court does not acknowledge it expressly, the combination of the Court's definition of minority voting strength and its test for vote dilution results in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups that are large enough to constitute majorities if concentrated within one or more single-member districts.
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> . . . .
>
> In my view, the Court's test for measuring minority voting strength and its test for vote

> dilution, operating in tandem, come closer to an absolute requirement of proportional representation than Congress intended when it codified the results test in § 2.
>
> . . . .
>
> The Court's standard for vote dilution, when combined with its test for undiluted minority voting strength makes actionable every deviation from usual, rough proportionality in representation for any cohesive minority group as to which this degree of proportionality is feasible within the framework of single-member districts. Requiring that every minority group that could possibly constitute a majority in a single-member district be assigned to such a district would approach a requirement of proportional representation as nearly as is possible within the framework of the single-member districts. Since the Court's analysis entitles every such minority group usually to elect as many representatives under a multi-member district as it could elect under the most favorable single-member district scheme, *it follows that the Court is requiring a form of proportional representation.*

478 U.S. at 85, 94 and 97 (emphasis supplied).

The concept of dilution of group voting strength [which is embodied in subsection (b) of amended Section 2] rests on two assumptions: (1) that each person's vote should have the same weight as another person's vote, and (2) that a given (protected) group should wield roughly the aggregate voting strength of its members. *See Zimmer v. McKeithen*, 485 F.2d 1297, 1304 (5th Cir. 1973). The second assumption depends on the validity of the first. Without the assumption of substantial equality among voting shares made possible by the one man, one vote principle, no aggregate measure of minority voting strength – and therefore no measure of dilution of that strength – is conceivable. Since the one man, one vote rule does *not* apply to the judiciary, the conceptually dependent notion of minority group vote dilution,

embodied in subsection (b), has no field of operation in judicial elections.

This argument has nothing to do with statutory interpretation, does not depend on a particular construction of the word "representative" as used in subsection (b), and is not based on whether Congress intended that amended Section 2 have some field of operation with respect to judicial elections. Instead, this argument is based on the fact that minority group vote dilution – as that concept has developed in the voting rights jurisprudence – simply cannot exist unless the one man, one vote rule applies.

In her concurring opinion in *Thornburg*, Justice O'Connor, joined by Justices Powell, Rehnquist, and Chief Justice Burger, notes that "[i]n order to evaluate a claim that a particular multimember district or single-member district has diluted the minority group's voting strength to a degree that violates § 2 . . . it is . . . necessary to construct a measure of 'undiluted' minority voting strength." *Thornburg*, 478 U.S. at 88. There is no doubt that the yardstick adopted by the *Thornburg* court – a calculation of the minority's potential voting strength in a single-member district system – rests on the assumption that the one man, one vote rule applies and that each district has roughly the same population. *See* 478 U.S. at 50-51 n.17. Otherwise, to paraphrase Justice Harlan, the Court would be unable even to measure what it purports to equalize. *Whitcomb v. Chavis*, 403 U.S. 124, 169 (Harlan, J., separate opinion).

Without the measure of individual voting strength provided in legislative cases by the one man, one vote rule, *Thornburg*'s test is meaningless in the judicial context. Since, under *Wells*, state judicial districts need not be equal in size, a state could *always* theoretically draw a district in which blacks constitute a voting majority by continuing to reduce the district geographically until blacks comprise a voting majority of the district. Indeed, there is, effectively, no "judicially discernible and manageable standard" by which a court could find that a given voting system does *not* dilute minority voting

strength if Section 2(b) applies to judges – and, thus, minority vote dilution claims are simply not justiciable given the *Wells* ruling.

As the Fifth Circuit held in *LULAC* (*en banc*):

> Absent the one-person, one-vote rule – that the vote of each individual voter must be roughly equal in weight to the vote of every other individual voter, regardless of race, religion, age, sex, or even the truly subjective and uniquely individual choice of where to reside – there is no requirement that any individual's vote weigh equally with that of anyone else. This being so, and no such right existing, we can fashion no remedy to redress the non-existent wrong complained of here.
>
> The notice of *individual* vote dilution, first developed by the Supreme Court in Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), was the foundation for the concept of *minority* vote dilution to be later elaborated in Whitcomb v. Chavis, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), White v. Regester, [412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973)], and Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973). Individual vote dilution was remedied by the Court through the concept of one-person, one-vote – the guarantee of substantial equality among individual voters. With that guarantee in mind, remedial schemes to combat minority vote dilution were devised on a case by case basis.

914 F.2d 620, 627 (emphasis in original).

The Senate Report concerning the 1982 amendment to the Voting Rights Act states "[t]he principle that the right to vote is denied or abridged by dilution of voting strength derives from the one-person, one-vote reapportionment case of *Reynolds v. Sims.*" S.Rep.No. 417, 97th Cong. 2d Sess. 19, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 177, 196.

The key issue, therefore, is whether Section 2(b) of the Voting Rights Act enshrines the "one man, one vote"

principle as the touchstone test. If it does, then it cannot be used to analyze judicial elections, because the "one man, one vote" test was expressly rejected as applying to the judiciary in *Wells v. Edwards*. 347 F. Supp. 453 (M.D. La. 1972) (three-judge court), *affirmed*, 409 U.S. 1095 (1973).

III. The Experience Of The Courts In Applying Section 5 Of The Voting Rights Act Is Not Relevant In Determining The Interpretation Of Section 2(b).

Section 2 of the Voting Rights Act, as amended, created a "results" test while the unamended Section 5 of the Voting Rights Act has always applied an "effects" test. The two sections serve entirely different purposes. Section 5 has a limited applicability – only to specific targeted states where voting statutory changes may not occur without "first demonstrating to a federal instrumentality that the change will be nondiscriminatory." *United States v. Board of Comm'rs of Sheffield*, 435 U.S. 110, 121 (1978). Unlike Section 2, Section 5 does not use the term "representatives." Indeed, the term "representatives" appears nowhere in the Voting Rights Act, except in Section 2(b). "Section 5 was intended to halt actual retrogression in minority voting strength without regard for the legality under state law of the practices already in effect." *Lockhart v. United States*, 460 U.S. 125, 133 (1983). Section 2(b), however, applies to the voting statutes of all states regardless of when such statutes were enacted.

A Section 2 violation must be established through a full judicial evidentiary hearing, in which the plaintiff carries the burden of proof. A Section 5 determination is made initially administratively, mostly through correspondence. If the Section 5 change is found objectionable, then the finding is subject to judicial review in the United States District Court for the District of Columbia, with the state bearing the burden of proof.

There was no determination by Congress that the "results" test under Section 2(b) would be identical to the "effects" test under Section 5:

> The confusion introduced by the results test is illustrated somewhat by the near-total disagreement as far as one of the most basic questions involved in the analysis: Does the "results" test proposed in section 2 mean the same thing as the "effects" test in section 5? Despite the fundamental importance of this matter, there has been disagreement among witness after witness on this.
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> . . . .
>
> During the course of both the House and Senate hearings on the Voting Rights Act, approximately half of the witnesses who discussed this issue claimed that the results tests in section 2 was similar or identical to the effects test in section 5, and hence that the judicial history of interpretation under section 5 was relevant; the other half argued that it meant something substantially or totally dissimilar.

Report of the Subcommittee on the Constitution to the Committee on the Judiciary on S. 1991, 97th Cong., 2d Sess., pp. 31-32 (April 1982).

Distinguished witnesses at the Congressional hearings testified that there were distinct differences between the tests in the two sections. Julius Chambers answered unequivocally on this point:

> Question: What is the relationship between the results test in section 2 and the effects test in section 5?
>
> Chambers: They are not the same test . . .

> Question: In other words, the experience of the courts with section 5 would not be relevant in determining how section 2 is likely to be interpreted?
>
> Chambers: That is correct.

Id. at 31-32.

Similarly, Professor Archibald Cox observed:

> If you mean the effects test as interpreted by the courts with regard to section 5, I think that is considerably different from the results test in section 2.

Id. at 32.

Senator Robert Dole, author of the compromise language for Section 2(b), stated during the Senate Hearings that the Section 5 "effects" test was different from the "results test" of *White v. Regester,* 412 U.S. 755 (1973), and that the House Report had been ambiguous concerning which test would apply under Section 2(b). *See Voting Rights Act: Hearings Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112,* 97th Cong. 2nd Sess. Vol. II, pp. 80-81 (May 4, 1982). His compromise language carried forth the *White* "results" test by directly codifying language from the *White* decision. *Id.*

The results test, as authoritatively interpreted by this Court in *Thornburg,* is a purely statistical analysis test[28]

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[28] The tri-part *Thornburg* test allows a plaintiff to use only statistical analysis to meet the burden of proof. 478 U.S. at 50, 51. The minority group must demonstrate that it is able to constitute a majority in a single member district; it must show it is politically cohesive (i.e. that it votes as a bloc; for these purposes statistical analysis of racially polarized voting is acceptable, 478 U.S. at 56); and it must show that the white majority votes sufficiently as a bloc to enable it to usually

(Continued on following page)

that uses bivariate ecological regression analysis[29] to prove a violation of Section 2(b). Only after the plaintiff meets this burden of proof does the Court look at the totality of the circumstances to confirm or deny the discrepancy.[30] While a defendant can try to point out some selected surrounding circumstances[31] to defend against a

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defeat the minority's preferred candidate (a proof that uses statistical analysis of racially polarized voting, *id.*). The proof of racially polarized voting itself is purely statistical: "[T]he legal concept of racially polarized voting incorporates neither causation nor intent. It means simply that the race of voters correlates with the selection of a certain candidate or candidates . . . " 478 U.S. at 62.

[29] Bivariate ecological regression analysis, a fancy term meaning a simple type of statistical test using only two variables, was the mechanism approved by the plurality opinion in *Thornburg v. Gingles*, 478 U.S. 30 (1986), to demonstrate that a contested voting mechanism or procedure "results" in a violation of Section 2.

[30] This Court, in *Thornburg*, noted that the totality of the circumstances test (the test from *White v. Regester*, 412 U.S. 755 (1973), and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973)) was not needed at all to prove a violation under Section 2(b). 478 U.S. at 44 n.8. As Justice O'Connor noted in her concurring opinion, "As shaped by the Court today, then, the basic contours of a vote dilution claim require no reference to most of the '*Zimmer* factors' . . . " 478 U.S. at 92.

[31] Not all circumstances may be relevant. For example, this Court in *Thornburg* noted that bloc voting is not disproved by the success of minority preferred candidates "in one or a few individual elections." 478 U.S. at 57. Likewise, the following factors cannot be used by defendants to rebut a violation: (a) proof that factors "other than race were the principal cause of voters' choices", 478 U.S. at 61, n.31; (b) "reasons why black and white voters vote differently", 478 U.S. at 63; (c) the fact that the minority group may be "predominately poor, uneducated, and unhealthy". 478 U.S. at 67.

vote dilution claim,[32] the totality of the circumstances test is not a method of proving the claim.

The effects test of Section 5 *is* the totality of the circumstances test. In other words, Section 5 does not look to statistics to find a violation but rather to the entire situation surrounding the electoral process. The distinction between the effects and the results test was stated succinctly by this Court in *Thornburg*:

> The [Senate] Report notes that in pre-Bolden cases such as White v. Regester and Zimmer v. McKeithen, plaintiffs could prevail by showing that, under the totality of the circumstances, a challenged election law or procedure *had the effect* of denying a protected minority an equal chance to participate in the electoral process. Under the "results test," plaintiffs are not required to demonstrate that the challenged electoral law or structure was designed or maintained for a discriminatory purpose.

Thornburg v. Gingles, 478 U.S. 30, 44 n.8 (1986) (citations omitted) (emphasis supplied). Thus, the effects test and the totality of the circumstances test are one and the same, and the "totality of the circumstances" is the touchstone of liability under Section 5, unlike the results test of Section 2(b), where liability is grounded in statistics and an evaluation of some of the circumstances becomes a defense.

CONCLUSION

This Court has always recognized the importance of an independent judiciary: "There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function." *Chandler*

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[32] This is the precise result of *Thornburg*, for the original finding that House District 23 violated Section 2(b) was reversed because this Court found that the lower court had ignored the significance of the "*sustained* success black voters" experienced in that district. 478 U.S. at 77 (emphasis in original).

v. Judicial Council, 398 U.S. 74, 84 (1970). Dissenting in the same case, Justice Douglas stated, "An independent judiciary is one of this nation's outstanding characteristics." *Id.* at 136 (Douglas, J. dissenting).

Making judges "representatives" would do violence to (and perhaps destroy) the American concept of an independent judiciary. It is inconceivable that Congress would have intended to adopt a system of "representative" judges without extensive debate concerning the resulting severe erosion of the judiciary's independence in the interpretation, consideration, and application of the law. As this Court said in *Withrow v. Larkin*, 421 U.S. 35 (1975), "Not only is a biased decision maker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.' " 421 U.S. at 47 (citations omitted). The concept of judges "representing" a designated constituency or a discrete category of people rather than being selected to do justice without fear of retribution from a narrow electorate is anathema to the magnificent American tradition of an independent judiciary.

Both the *en banc* decision in *LULAC* and the opinion, decision, and judgment of the district court in this proceeding should be affirmed.

All of the above and foregoing is thus respectfully submitted.

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